PD-1180-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-1180-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
12/9/2016
ABEL ACOSTA, CLERK

ALVIN WESLEY PRINE, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Liberty County

* * * * *

STATE'S BRIEF ON THE MERITS

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Alvin Wesley Prine, Jr.

* The trial Judge was Hon. Mark Morefield, 75th Judicial District Court.

* Trial counsel for the State were Logan Pickett and Stephen C. Taylor, 1923 Sam Houston Street, Room 112, Liberty, Texas 77575.

* Counsel for the State before the Court of Appeals was Stephen C. Taylor, 1923 Sam Houston Street, Room 112, Liberty, Texas 77575.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant at trail was Alvin Saenz, 18333 Egert Bay Blvd., Suite 270, Houston, Texas 77058.

* Counsel for Appellant before the Court of Appeals was Steven Greene, P.O. Box 232, Anahauc, Texas 77514.

INDEX OF AUTHORITIES

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TO THE COURT OF CRIMINAL APPEALS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully presents her Brief on the Merits.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument, and the Court did not grant it.

STATEMENT OF THE CASE

Appellant was convicted of sexual assault, and a jury sentenced him to twenty years' imprisonment and fined him $8,000. The majority of the court of appeals affirmed Appellant's conviction but reversed on punishment. It held that trial counsel rendered ineffective assistance for calling witnesses whose testimony led to the admission of prejudicial evidence. *Prine v. State*, __ S.W.3d __, No. 14-15-00313-CR, 2016 Tex. App. LEXIS 8404, at *34-43 (Tex. App.—Houston [14th Dist.] 2016). Justice Frost dissented, asserting that the presumption that counsel had a reasonable strategy was not rebutted because counsel had no opportunity to defend his decision. *Id*. at *47-54.

ISSUES PRESENTED

1. **When the record is silent as to defense counsel's reasons for calling witnesses in support of jury-ordered probation, has the presumption of reasonable strategy been rebutted?**

2. **If the reasonableness presumption was rebutted, did defense counsel render ineffective assistance in calling witnesses who presented favorable evidence but also opened the door for damaging evidence?**

SUMMARY OF THE ARGUMENT

The court of appeals erred to review the merits of Appellant's ineffective assistance claim because Appellant failed to meet his initial burden. No trial attorney should be found ineffective on a silent appellate record based on a decision that is

purely strategic. The ramifications associated with such an inadequately informed judgment call by an appellate court require this Court to enforce the presumption that counsel's performance satisfied prevailing professional norms. Next, the court of appeals erred to conclude that counsel's decision here had no reasonable strategic benefit when the record plainly shows otherwise. The benefits of the witnesses' testimony outweighed the introduction of the damaging evidence that was the by-product of their testimony. Finally, there is no resulting prejudice given the circumstances specific to the defendant that limit the damaging impact of the harmful evidence.

STATEMENT OF FACTS

1. Background

Appellant, while intoxicated, sexually assaulted a nineteen-year-old female acquaintance who was passed out drunk in a truck. 1 CR 11, *see generally*, 5 RR. He was arrested after fleeing the scene. 4 RR 154.

The day before the punishment proceeding began, the prosecutor told defense counsel he had just discovered that Appellant had impregnated his family's fifteen-year-old babysitter about twenty-five years earlier. 6 RR 32-36. The prosecutor informed counsel that he intended to use the information at trial. 6 RR 34.

2. Punishment Proceeding

Appellant called three witnesses: Probation Officer Jason Jones and family members Brenda Potter and Dorothy Prine.

i. *Jason Jones*: Probation Officer

Probation Officer Jason Jones had a five-minute consultation with Appellant immediately before testifying for the defense. 6 RR 22-23. Appellant told him that his criminal history included only traffic tickets. 6 RR 22-23. Jones began by explaining the mechanics of probation for sex-offenders on direct examination. 6 RR 10-15. On redirect-examination, in response to defense counsel's inquiry, he listed the requirements of probation eligibility. 6 RR 18. Jones acknowledged that there is a difference between being "eligible" versus being "deserving" of probation. 6 RR 19. Jones also stated that Appellant is eligible but that it would be the jury's role to determine suitability. 6 RR 22-23. At that point, the prosecutor on re-cross-examination asked whether he had heard that Appellant "had knocked up a 15-year-old girl when he was already married and had children [with his wife]?" 6 RR 23. Defense counsel immediately objected. 6 RR 23. The trial court declined to rule but told the prosecutor to "reserve this line of questioning. I don't think it's appropriate with this particular witness." 6 RR 23. Moving on, the prosecutor recited the basic facts of this case and asked whether he believed Appellant deserved probation based

on his interview. 6 RR 25. Jones stated, "No, sir." 6 RR 25.

ii. *Brenda Potter*: Appellant's Aunt

Appellant's aunt, Brenda Potter, asked the jury to consider probation and explained that Appellant had a stroke after the offense, leaving him disabled. 6 RR 26, 29. On cross-examination, the prosecutor asked Potter about the mother of Appellant's daughter. 6 RR 32, 45. Potter acknowledged that she was aware that B.M.'s mother was fifteen when Appellant got her pregnant. 6 RR 35. The prosecutor then asked whether she believed Appellant was a good candidate for probation. 5 RR 35. Potter answered in the affirmative. 6 RR 35. On redirect, defense counsel established that B.M is now in her mid-twenties and that Appellant had paid child support and remains involved in her life. 6 RR 36. The prosecutor, on re-cross-examination, asked if he had tried to be a "daddy" to the daughter he "immorally" conceived. 6 RR 36. Potter stated, "I guess." 6 RR 36.

iii. *Dorothy Prine*: Sister

Appellant's sister, Dorothy Prine, testified about her loving and positive relationship with Appellant, as well as their poor health and her dependence on him. 6 RR 49. Appellant, to her knowledge, had never been arrested or convicted. 6 RR 41-42. On cross-examination, the prosecutor asked Dorothy about Appellant's affair with the fifteen-year-old babysitter. 6 RR 52-54. She conceded that it may have been

a crime and Appellant's fault, but she disagreed with the characterization nevertheless, saying the babysitter knew what she was doing. 6 RR 53. Defense counsel ended on this point, asking whether she understood that it was illegal. 6 RR 58. She said, "Yes." 6 RR 58. Knowing this, and taking into account Appellant's health, she again requested probation. 6 RR 58.

ARGUMENT

1. Ineffective Assistance of Trial Counsel Standard

To prevail on a claim of ineffective assistance, an individual must establish, by a preponderance of the evidence, "that counsel's performance 'was deficient and that a probability exists, sufficient to undermine [the court's] confidence in the result, that the outcome would have been different but for counsel's deficient performance.'" *Ex parte Amezquita*, 223 S.W.3d 363, 366 (Tex. Crim. App. 2006) (quoting *Ex parte White*, 160 S.W.3d 46, 49 (Tex. Crim. App. 2004)). To show deficient performance, an appellant must show that "counsel was not acting as a 'reasonably competent attorney,' and that his advice was not within the range of competence demanded of attorneys in criminal cases." *Ex parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengable[,]" unless outside the wide range of

competent assistance. *Strickland*, 466 U.S. at 690; *see also Ex parte Ellis*, 233 S.W.3d 324, 331, 336 (Tex. Crim. App. 2007) (even a risky, and perhaps undesirable, all or nothing strategy is within the range of reasonable professional assistance). In establishing resulting prejudice, "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Ineffective assistance claims not litigated on a motion for new trial but, instead, for the first time on direct appeal face an additional hurdle. "Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation." *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999).

2. The presumption that counsel's strategy was unreasonable has not been rebutted.

Because the record on direct appeal is undeveloped, it does not, on its face, support a finding of deficient performance. Indeed, this Court has repeatedly observed that reviewing courts are required to "presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that he 'made all significant decisions in the exercise of reasonable professional judgment.'" *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992) (quoting *Strickland*, 466 U.S. at 690)).

As Justice Frost concluded, without a response or explanation from counsel, Appellant failed to rebut the presumption of reasonableness. *See Prine*, 2016 Tex. Crim. App. LEXIS 8404, at *47 (Frost, J., dissenting). "Weighing the risks and benefits of presenting a particular witness is exactly the type of strategic decision that ordinarily requires courts to evaluate an attorney's explanations before concluding counsel was ineffective." *Id*. at *49. Justice Frost illustrated this point by listing pertinent fact questions that need to be addressed before the presumption can be rebutted:

> *Did trial counsel think the probation officer's testimony was necessary, but determined that telling the probation officer details such as the defendant's denial of his guilt, would make it more difficult for appellant to receive probation? Did trial counsel inform the probation officer of those facts and the probation officer forgot? Did trial counsel have reason to believe, based on prior conversations with the probation officer, that those facts would not impact the probation officer's testimony?*
>
> *Did trial counsel weigh the damage of the statutory rape committed twenty-seven-years earlier against the impact of the additional testimony the sister provided about appellant's limitations and his past support of family members? Did trial counsel think it was important for the jury to understand the impact and extent of appellant's health problems? Did trial counsel think the sister's opinion that appellant's actions were heavily influenced by his intoxication might sway the jury based on the fact that the sister testified appellant no longer consumes alcohol? Did appellant insist on presenting both character witnesses to the jury? Did trial counsel think the sister would provide a more sympathetic or compelling explanation of appellant's actions? Did counsel make a calculated decision to risk additional testimony about the fifteen-year-old for the chance to present favorable testimony that*

might not have been available from other sources?

Id. at *54-57 (emphasis in original).

These are crucial, determinative questions that must be answered by counsel to properly evaluate whether he performed deficiently; a finding of ineffective assistance should never be sustained on mere conjecture. *Cf. Ex parte White*, 160 S.W.3d at 52 (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983)) ("Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony.")); *see also Ex parte Ramirez*, 280 S.W.3d 848, 853-54 (Tex. Crim. App. 2007) (applicant failed to show that testimony of uncalled witnesses would have been favorable and that counsel's failure to review video recording of the crime was prejudicial). *Compare with Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005) (counsel found ineffective on a silent record regarding a matter unsupported by strategy; he failed to object to prosecutor's misstatement about sentence-stacking when the State had moved to cumulate).

The consequences of the lower court's decision are great. Counsel's professional standing with the courts and the State Bar could be forever tarnished.

This would likely affect counsel's livelihood[1] and ability to meet financial obligations. Further, counsel could lose a board certification. *See* Texas Plan for Recognition and Regulation of Specialization in the Law, Section VIII, Revocation of Certification, available at http://content.tbls.org/pdf/attpln.pdf, *last visited* December 6, 2016. Such harsh collateral consequences demonstrate the need to give trial counsel an opportunity to respond, absent the rare "outrageous" case, before it can be said that a direct appeal record evidences deficient performance.

Because the record is silent, Appellant failed to rebut the presumption that counsel acted reasonably.

3. Even if the presumption has been rebutted, counsel was not deficient.

Counsel's decision to call Jones, Potter, and Dorothy to testify was well within the bounds of reasonable professional performance. Defense counsel's strategy at the outset was to seek a probated sentence in the event Appellant was convicted. This is demonstrated by the pretrial application for probation he filed. 1 CR 28. It was

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[1] If counsel is held ineffective, then counsel has failed to meet the State Bar performance standards for criminal defense attorneys. *See* Blackburn and Marsh, TEXAS BAR JOURNAL JULY 2011, *State Bar of Texas Performance Guidelines for Non-Capital Criminal Defense Representation*. And to be considered for appointment as the Director of Capital and Forensic Writs, a candidate must not have been found ineffective during trial or on appeal. TEX. GOV'T CODE § 78.004(b)(2). The same standard applies to attorneys employed by the Office for purposes of death-penalty clients. TEX. GOV'T CODE § 78.053(b).

then incumbent upon defense counsel to establish the circumstances that would render Appellant eligible and suitable. The jury would have to find Appellant did not have a prior felony conviction, as stated in his application, and the jury would have to assess a term of imprisonment under ten years. TEX. CODE CRIM. PROC. art. 42.12 § 4(a), (d)-(e); *Mayes v. State*, 353 S.W.3d 790, 793 (Tex. Crim. App. 2011); *see also* 6 RR 18.

Jones

Jones, who was a ten-year-member of the Liberty County Probation Department, was qualified to explain how sex-offender probation operates. 6 RR 9. If granted probation, Jones stated, the Department takes over to ensure that probationers satisfy the attendant terms and conditions. 6 RR 10. Most probationers report monthly, while high-risk ones report more often. 6 RR 11, 14-15. If a probationer violates any conditions, the Department attempts to handle it through an administrative hearing. 6 RR 11. If the violation is severe, however, they may bring the probationer back before the trial court. 6 RR 15. The court can revoke probation on a lesser burden (preponderance) and send the person to prison. 6 RR 15, 21. Jones also listed several probation conditions: submitting to a psychological assessment to identify strengths and weaknesses relevant to supervision; counseling with a licensed sex-offender counselor; paying court costs, fees, and restitution;

performing hours of community service; no drug or alcohol use, which is monitored through urinalysis; following criminal laws; remaining within the county unless given permission to leave; random home and employment visits and compliance checks; and, submitting to polygraph tests. 6 RR 11-14. Jones also stated that it is the jury's role to determine whether Appellant is worthy of probation. 6 RR 22-23.

On cross-examination, Jones testified that many of the prohibitions, like following the law and not drinking and driving, require the probationer to be caught and that any polygraph is inadmissible in court. 6 RR 18-20. Jones ended his testimony by giving his opinion that Appellant did not deserve probation. 6 RR 25.

Jones' testimony informed the jury that probation comes with many restrictions on personal behavior, social interaction, employment, and travel. It includes conditions that are tailored to the particular probationer to ensure compliance and rehabilitation, as well as community safety. Without this information, the jury could have simply believed that probation allows a person to resume their life, uninterrupted and without sanction and restrictions. As Justice Frost observed, Jones set up the framework for the jury to recommend probation instead of immediate imprisonment. *Prine*, 2016 Tex. App. LEXIS 8404, at *51 (Frost, J., dissenting). That Jones stated Appellant should not be placed on probation did not outweigh the benefit of his testimony as a whole.

Further, Jones' opinion had limited weight because his consultation with Appellant was brief and generic; it did not involve any inquiry into the litany of facts and circumstances that would be relevant to probation, like those revealed in a psycho-social-assessment. *Compare with Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006) (probation officer's opinion about the defendant's suitability for probation was based on her professional knowledge and experience as well as her personal knowledge and perceptions of the defendant and victims). So while Jones properly based his opinion on his personal knowledge, the limited information he considered is far from conclusive for purposes of sentencing.[2] With the exception of the required finding of no prior felony conviction, the jury, considering all of the evidence, engaged in a normative process "uninhibited by any required, specific fact determination to decide what particular punishment to set within the range prescribed by law." *Jordan v. State*, 256 S.W3d 286, 292 (Tex. Crim. App. 2008). Further, counsel's generic set-up with Jones was followed by an individualized approach. As discussed below, he relied upon Potter and Dorothy—family members with whom had a lifelong history with Appellant—to prove eligibility and persuade the jury

[2] As correctly recognized by Justice Frost, the majority gave no valid legal basis for its determination that counsel was deficient for failing to object to Jones' opinion. *Prine*, 2016 Tex. App. LEXIS 8404, at *58. In the court of appeals, Appellant only claimed that the question assumed facts not in evidence. Appellant's COA Brief, at 34. This basis is not supported by the record.

Appellant was deserving. Defense counsel's decision to call Jones was reasonable.

Potter and Dorothy

That Potter's and Dorothy's testimony opened the door to the admission of the babysitter evidence also does not demonstrate deficient performance.

Potter provided important background information about Appellant that was highly relevant to the probation issue. Potter believed that the offense was out of character for Appellant, asked the jury to consider probation, and stated he would comply with the rules. 6 RR 29. She also testified that Appellant was a "good person" to the family and has taken care of her and his parents, would not be danger, and had become disabled from a stroke after the offense. RR 27-29.

Dorothy also urged the jury to grant probation. 6 RR 48. Her testimony, in addition to providing some valuable psycho-social-history about Appellant and their family, helped Appellant prove that he had no prior felony conviction. She testified that Appellant had never been arrested or convicted of a misdemeanor or felony in Texas or another state. 6 RR 41-42.

Dorothy also testified that Appellant was "a very kind, loving brother, always been there for me." 6 RR 39; *see also* 6 RR 41. He provided emotional support when she revealed she had an abortion after her father raped and impregnated her as a teen. 6 RR 46, 52, 54. She "wouldn't be here today because [she] tried to kill [herself]."

6 RR 47. Given this experience, she believed that Appellant did not condone rape. 6 RR 47. She acknowledged the jury's verdict but stated that she understood Appellant had been intoxicated and believed there had been no penetration, which, in her mind, meant there was no actual rape. 6 RR 40, 55-57.

She testified about Appellant's poor health. 6 RR 40-42. He had a stent inserted after having a heart attack in 2009. 6 RR 40. He had blockage surgeries in 2009 and 2013; since then, his memory has not been good. 6 RR 40. He also suffered two strokes, which resulted in a speech impediment. 6 RR 40-41. His first occurred a week after the offense. 6 RR 48. Appellant now has limited use of his hands and arms as well as his hip. 6 RR 47-48, 50. His limitations come and go. 6 RR 55. Additionally, because of her own health problems, Dorothy stated that she needs him. 6 RR 48, 56.

She believed Appellant is responsible, not a danger, would comply with probation conditions, and has not had alcohol since the night of the offense. 6 RR 47-48, 50.

Overall, Potter's and Dorothy's testimony provided meaningful mitigating evidence in support of the request for probation. Without their testimony, Appellant would not have had evidence demonstrating that he was eligible for probation, was not a threat to the community because of his general good character when sober and

his recent physical disabilities, would comply with probation conditions, and had strong family ties and loyalty.

Though the babysitter evidence was damaging, its prejudicial impact was diminished by the passage of time. Appellant was fifty-four when he committed this offense, and he was about twenty-five years old when he impregnated the babysitter. Along with the more than twenty-five-year gap, there was evidence that Appellant had supported B.M and was involved with her as a father. The time-gap also highlights Appellant's current disabled status, which did not occur until many years after B.M. was conceived. Finally, even though he clearly violated the law, the relationship with the babysitter was portrayed as having been reciprocal. The extraneous offense, when considered in context, did not conclusively establish that Appellant would be a recidivist sex-offender if granted probation.

The favorable testimony in support of probation outweighed the negative effect of the extraneous offense. Counsel's decision to call these witnesses was objectively reasonable according to professional standards.

4. Resulting prejudice has not been established.

There is no resulting prejudice. As a matter of procedure, the court of appeals relied on the deficient acts—the complained-of evidence—to conclude that Appellant was prejudiced. *See Prine*, 2016 Tex. App. LEXIS 8404, at *43-46. This circular

analysis is insufficient. The court also pointed to the jury's assessment of the maximum sentence and fine. However, the extreme sentence and fine also support that opposite conclusion—that the jury would not have granted probation even in the absence of the damaging evidence. Again, because the record is undeveloped, it is unknown whether there were any other witnesses who could have testified about Appellant's eligibility and suitability without exposure to damaging cross-examination. So, presumably, counsel may have had no one who was available to testify. Next, the facts are undoubtedly troubling on their own. And, as explained above, both pieces of damaging evidence had limited impact under these circumstances. Jones' opinion was based on incomplete information, and the babysitter evidence was weakened by the passage of time, Appellant's now-disabled condition, his support of and involvement with B.M., and his family's understanding of the character of the relationship between Appellant and B.M.'s mother. Even assuming counsel was deficient, Appellant was not prejudiced at punishment.

IV. Conclusion

Counsel should not be held ineffective for a strategic decision that he has not had the opportunity to defend. The consequences attached to permitting courts of appeals to second-guess such strategic decisions should be considered in deciding whether an Appellant's initial burden can be satisfied when counsel had no

opportunity to respond. Next, even if the presumption of effective assistance has been rebutted, counsel's decision was reasonably strategic. Finally, there is no resulting prejudice from the admission of the damaging evidence.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the court of appeals and reinstate the jury's punishment verdict.

Respectfully submitted,

/s/ Stacey M. Soule
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,352 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on December 9, 2016, via email or certified electronic service provider to:

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